

ATTACHMENT D

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

No. 5:09-CV-00517-BR

BellSouth Telecommunications, Inc.
d/b/a AT&T North Carolina,

Plaintiff,

v.

Edward S. Finley, Jr., Chairman,
Lorinzo L. Joyner, Commissioner, and
William T. Culpepper, III, Commissioner,
in their official capacities and not as individuals

and

Intrado Communications Inc.,

Defendants.

**DEFENDANT
INTRADO COMMUNICATIONS INC.'S
MOTION FOR SUMMARY JUDGMENT
Fed. R. Civ. P. 56; Local Rule 7.1**

Defendant Intrado Communications Inc. ("Intrado Comm"), by and through its undersigned attorneys, hereby submits this Motion for Summary Judgment ("Motion") in the above-captioned matter in accordance with the Scheduling Order issued by the Court on March 25, 2010. Intrado Comm respectfully moves for summary judgment in favor of Intrado Comm on all claims in the Complaint filed by Plaintiff BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina ("AT&T"), which seeks declaratory and injunctive relief from orders of the North Carolina Utilities Commission ("NCUC") entered in an arbitration proceeding brought by Intrado Comm to establish an interconnection agreement with Plaintiff AT&T. The parties have agreed upon a settled administrative record, and thus there is no genuine issue of material fact. Intrado Comm is entitled to judgment as a matter of law because the NCUC decision to grant Intrado Comm interconnection with AT&T was consistent with the federal

Communications Act of 1934, as amended ("Act"), and the interpretation of that federal Act by the Federal Communications Commission. A Memorandum of Law in Support of this Intrado Comm's request for summary judgment accompanies the filing of this Motion.

Respectfully submitted this 26th day of April, 2010.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

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d/b/a AT&T North Carolina,)
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Plaintiff,)
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William T. Culpepper, III, Commissioner,)
in their official capacities and not as individuals)
)
and)
)
Intrado Communications Inc.,)
)
Defendants.)

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record: Eric H. Cottrell, attorney for Plaintiff, and Margaret A. Force, Attorney for Defendant North Carolina Utilities Commission Commissioners.

Respectfully submitted,

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**MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT
INTRADO COMMUNICATIONS INC.'S
MOTION
FOR SUMMARY JUDGMENT
Fed. R. Civ. P. 56; Local Rules 7.2, 10.1**

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Defendant Intrado Communications Inc. (“Intrado Comm”) respectfully submits this Memorandum of Law (“Memorandum”) in support of its Motion for Summary Judgment. As will be shown herein, BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina (“AT&T”) has failed to meet its burden of proof showing that the interpretation by the North Carolina Utilities Commission (“NCUC”) of Section 153(47) of the federal Communications Act of 1934, as amended (the “Act”)¹ was erroneous in NCUC Docket P-1187 Sub 2, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*.² Summary judgment is therefore appropriate because the NCUC’s arbitration orders are consistent with federal law, are supported by substantial evidence, and are neither arbitrary nor capricious.³

NATURE OF THE CASE

AT&T first allocated wireline emergency access via the digits “9-1-1” in 1965, and the telephonic code has grown to function as “a single, nationally used three-digit number that is easy to remember and dial in emergency situations.” *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced Emergency 911 Calling Systems*, 9 FCC Rcd 6170, ¶¶ 3-4 (1994) (“*E911 NPRM*”); *see also* Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286, 1287 (“911 Act”) (mandating the digits “9-1-1” as the universal

¹ 47 U.S.C. § 153(47).

² Docket No. P-1187, Sub 2, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Recommended Arbitration Order (Apr. 24, 2009) (“*RAO*”) (Record Index No. 56) (Exhibit 2); Order Ruling on Objections and Requiring the Filing of a Composite Agreement (Sept. 10, 2009) (“*Order on Objections*”) (Record Index No. 67) (Exhibit 3).

³ The parties have agreed upon a settled administrative record, and thus there exist no material issues of fact in dispute. All cites to record evidence herein are to the index of the administrative record, which is set forth in Entry #25 of the Court’s docket.

number for emergency calling). Since that time, the Federal Communications Commission (“FCC”) and Congress have consistently recognized the centrality of 911 services⁴ in carrying out the statutory mandate to “promot[e] safety of life and property through the use of wire and radio communications.” 47 U.S.C. § 151. By enabling emergency services personnel to respond more quickly and efficiently, 911 services protect property and safeguard lives. *See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676, ¶ 5 (1996) (“1996 E911 Order”).

The NCUC has been afforded especial responsibility for the oversight of 911 services.⁵ *See, e.g., VoIP E911 Order* ¶¶ 31, 33 (noting that Sections 251(e) and 706 of the Act give state commissions the authority to oversee the deployment of 911 services); *id.* ¶ 32 (“In the 911 Act, Congress made a number of findings regarding wireline and wireless 911 services, including that ‘improved public safety remains an important public health objective of Federal, State, and local governments and substantially facilitates interstate and foreign commerce,’ and that ‘emerging technologies can be a critical component of the end-to-end communications infrastructure connecting the public with emergency [services].’”) (citing 47 U.S.C. § 615(a)(3)). The NCUC also has a significant role in the development of competitive telecommunications markets, which includes the competitive 911 market. *See, e.g., Public Utility Commission of Texas, et al.*, 13

⁴ As used herein, “911 services” includes both basic 911 services, where calls dialed to 911 are transmitted from the service provider’s switch to a single geographically appropriate public safety agency, and enhanced 911 or “E911” services, which route 911 calls to a geographically appropriate public safety agency based on the caller’s location and also provide the call taker with the caller’s call back number or automatic numbering information (“ANI”) and location information or automatic location identification (“ALI”). *See IP-Enabled Services, et al.*, 20 FCC Rcd 10245, ¶¶ 12-13 (2005) (“VoIP E911 Order”).

⁵ Note that in 2007, the North Carolina General Assembly enacted H.B. 1755, intended to “modernize and improve the administration of the state’s 911 system through a statewide 911 board, by ensuring that all voice services contribute to the 911 system and by proving parity in the quality of service and the level of 911 charges across voice communications service providers.” 2007 N.C. Sess. Laws 383; *see also generally* N.C. GEN. STAT. § 62A.

FCC Red 3460, ¶ 52 (1997); *American Communications Services, Inc., et al.*, 14 FCC Red 21579, ¶ 35 (1999).

Emergency calling services have historically been the province of incumbent local exchange carriers (“ILECs”) like AT&T, and today represent the last remnant of the monopolistic telecommunications market that existed prior to the passage of the Telecommunications Act of 1996 (the “1996 Act”).⁶ Thus, Intrado Comm’s Intelligent Emergency Network[®] 911 service offering (“IEN”) represents the first true competitive offering in the forty-year history of 911 service. Relying on robust Internet protocol (“IP”) technology, Intrado Comm’s 911 service substitutes for ILEC routing and transport of emergency calls to the appropriate public safety answering point (“PSAP”),⁷ along with database management services for accurate emergency service dispatch, but goes well beyond legacy ILEC systems. IEN allows new technologies, devices, and applications to access the 911 system and gives PSAPs and first responders immediate access to critical information such as medical records, building blueprints, etc., all part of a continuum inherent in any particular 911 call. For example, Intrado Comm’s network can transmit 911 calls originating from end users subscribing to both traditional voice providers (*e.g.*, AT&T) and non-traditional providers (*e.g.*, cable companies, Google, OnStar) as well as from non-traditional devices (*e.g.*, 911 “texts” from a wireless device or FDA-approved defibrillators embedded in a person’s chest that can automatically “call” 911 as soon as a heart attack begins). As a competitor, Intrado Comm offers PSAPs a

⁶ PUB. L. NO. 104-104, 110 Stat. 56 (1996).

⁷ A “PSAP” is a “point that has been designated to receive 911 calls and route them to emergency service personnel.” 47 C.F.R. § 20.3; *accord* N.C. GEN. STAT. § 62A-40(18) (defining PSAP as a “public safety agency that receives an incoming 911 call and dispatches appropriate public safety agencies to respond to the call”). As used herein, the term “PSAP” refers to any public safety agency, 911 authority, 911 administrative agency, or other entity that may be responsible for purchasing and/or receiving 911 services to ensure consumers living in the relevant geographic area can reach emergency responders.

technologically progressive alternative to traditional, ILEC-maintained, wireline-based 911 systems consistent with Congressional goals and mandates. *See, e.g., Implementation of the NET 911 Improvement Act of 2008*, 23 FCC Rcd 15884, ¶ 22 (2008) (“*NET 911 Order*”) (“as Congress recognized, the nation’s 911 system is evolving from its origins in the circuit-switched world into an IP-based network”).

Congress intended the 1996 Act “to force incumbent providers of local telecommunications services . . . which had regional monopolies over the local telephone infrastructure, to open their markets to competition.” *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 444 (4th Cir. 2007). “Congress, of course, recognized that a new carrier would not be able to break into a local market if it had to bear the prohibitive costs of building an entire telephone network.” *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 358 (4th Cir. 2004). Consequently, statutory provisions were enacted to permit competitive carriers like Intrado Comm to interconnect with ILECs like AT&T. In order for Intrado Comm to provide its competitive services in North Carolina, Intrado Comm must interconnect with ILECs like AT&T that control access to the public switched telephone network (“PSTN”), and consequently, access to the consumers who make 911 calls destined for Intrado Comm public safety customers and those Intrado Comm 911 calls destined for AT&T-served PSAP customers.

Among the most vital of these statutory provisions are Sections 251 and 252 of the Act, which are designed to promote competition by facilitating the interconnection of new entrants like Intrado Comm to the PSTN to ensure the interoperability of co-carrier networks.⁸ Congress recognized that ILECs, such as AT&T, would have the incentive to thwart competition, and it

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 10 (1996) (“*Local Competition Order*”) (intervening history omitted), *aff’d by AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

therefore established the 251/252 negotiation and arbitration process, which conferred upon competitive carriers not only the right to interconnect with the incumbent, but the right to do so on fair and pro-competitive terms. *See Local Competition Order* ¶ 15 (the “statute addresses this problem [of the incumbent’s “superior bargaining power”] by creating an arbitration proceeding in which the new entrant may assert certain rights”); *Verizon Maryland*, 377 F.3d at 358 (“Section 251 of the Act . . . requires an incumbent local carrier to share its network and services, on reasonable rates and terms, with a competing carrier seeking to enter a local telephone market”). Sections 251 and 252 of the Act are specifically designed to address the unequal bargaining power manifest in negotiations between ILECs and competitors in order to advance Congress’s goal of increased competition. *See Local Competition Order* ¶ 134 (noting that “because it is the new entrant’s objective to obtain services and access to facilities from the incumbent” and thus “has little to offer the incumbent in a negotiation,” the Act creates an arbitration process to equalize this bargaining power).

Interconnection in this matter is not, as AT&T’s Complaint seems to suggest, a wholly technical matter to be debated within a vacuum. Instead - as so many other state public utility commissions have recognized in extending Section 251 rights and responsibilities to Intrado Comm⁹ - interconnection is predicated upon enabling Intrado Comm to offer state-of-the-art 911

⁹ *See, e.g.,* Ohio Case No. 07-1216-TP-ARB, *Petition of Intrado Communications, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Embarq and United Telephone Company of Indiana dba Embarq pursuant to Section 252(b) of the Telecommunications Act of 1996*, Arbitration Award (Sept. 24, 2008) (Exhibit 4); Ohio Case No. 08-537-TP-ARB, *Petition of Intrado Communications Inc. for Arbitration pursuant to Section 252(b) of the Communications Act of 1934, as Amended, to Establish an Interconnection Agreement with Cincinnati Bell Telephone Company*, Arbitration Award (Oct. 8, 2008) (Exhibit 5); West Virginia Case No. 08-0298-T-PC, *Intrado Communications Inc. and Verizon West Virginia Inc., Petition for Arbitration Pursuant to Section 252(b) of 47 U.S.C. and 150 C.S.R. 6.15.5*, Arbitration Award (Nov. 14, 2008), approved by Commission Order (Dec. 16, 2008) (Exhibit 6); Ohio Case No. 07-1280-TP-ARB, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 as amended, to Establish an Interconnection Agreement with the Ohio Bell Telephone Company dba AT&T Ohio*, Arbitration Award (Mar. 4, 2009) (“AT&T Ohio Arbitration

services that will promote the public safety and welfare. This is not simply another proceeding between an ILEC and a competitive local exchange carrier (“CLEC”) with respect to interconnection for plain old telephone services (“POTS”). Instead, this proceeding is about interconnection arrangements to be established between Intrado Comm and AT&T that will permit Intrado Comm to provide competitive 911 services to PSAPs, the entities responsible for ensuring rapid, efficient response to North Carolina consumers’ requests for emergency assistance, as well as other types of 911 services. As the FCC has recognized, the provision of 911 services raises issues of public safety and policy considerations not present in typical interconnection arrangements. *See, e.g., Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 10541, ¶ 96 (2007) (“It is critical that Americans have access to a resilient and reliable 911 system irrespective of the technology used to provide the service.”).

Thus, contrary to AT&T’s claim, *see* Complaint at 8, the NCUC’s determination that Intrado Comm offers “telephone exchange service” reflects the correct interpretation of federal law as well as an appropriate exercise of the NCUC’s duty to “protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C. § 253(b); *see also VoIP E911 Order* ¶ 8 (“absent appropriate action by, and funding for, states and localities, there can be no effective 911 services”); *Implementation of*

Award”) (Exhibit 7), Entry on Rehearing (June 17, 2009) (“*AT&T Ohio Entry on Rehearing*”) (Exhibit 8) *appeal pending* 09-CV-00918-ALM-MRA, *The Ohio Bell Telephone Company v. Public Utilities Commission of Ohio, et al.*, Complaint for Declaratory and Injunctive Relief (S.D. Ohio filed Oct. 15, 2009); Mass. D.T.C. 08-9, *Petition for Arbitration of an Interconnection Agreement between Intrado Communications Inc. and Verizon New England, Inc. d/b/a Verizon Massachusetts*, Arbitration Order (May 8, 2009) (Exhibit 9); Ohio Case No. 08-198-TP-ARB, *Petition of Intrado Communications Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Verizon North Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996*, Arbitration Award (June 24, 2009) (Exhibit 10); Maryland Case No. 9138, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Verizon Maryland Inc.*, Order (Dec. 15, 2009) (Exhibit 11).

the 911 Act, et al., 16 FCC Rcd 22264, ¶¶ 1, 7 (2001) (noting “the important role of States and localities in their continuing efforts to improve emergency service”). Accordingly, the NCUC’s decision to grant Intrado Comm interconnection should be upheld as a matter of law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In May 2007, Intrado Comm sought interconnection with AT&T pursuant to the pro-competitive process established by Congress in Sections 251/252 of the Act and discussed above. Despite its best efforts, Intrado Comm was unable to negotiate a mutually beneficial interconnection agreement with AT&T and thus filed a petition for arbitration with the NCUC as contemplated by Section 252 of the Act.¹⁰ In response to Intrado Comm’s arbitration petition, the NCUC engaged in extensive fact-finding and legal analysis, which included discovery, direct and rebuttal testimony, an on-the-record hearing, legal briefs/proposed orders, and review of supplemental authorities. The NCUC also requested that its Public Staff participate in the arbitration proceeding.¹¹ The Public Staff was established within the NCUC to, among other things, make appropriate recommendations to the NCUC and intervene in NCUC proceedings “on behalf of the using and consuming public.” N.C. GEN. STAT. § 62-15.

Throughout the arbitration proceeding, AT&T challenged Intrado Comm’s interconnection rights based on AT&T’s claims that Intrado Comm’s services did not meet the statutory predicate for obtaining 251(c) interconnection, *i.e.*, that the service for which interconnection was requested be considered “telephone exchange service” or “exchange access”

¹⁰ Docket No. P-1187, Sub 2, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Petition for Arbitration (filed Dec. 21, 2007) (“Intrado Comm Petition”) (Record Index No. 1).

¹¹ Docket No. P-1187, Sub 2, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Order Setting Procedural Schedule (May 8, 2008) (Record Index No. 21).

service as those terms are defined in the Act. *See* 47 U.S.C. § 251(c)(2); *see also* 47 U.S.C. §§ 153(47) (defining “telephone exchange service”), 153(16) (defining “exchange access”); *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 661, 664 (E.D.N.C. 1998) (“an ILEC must provide a requesting telecommunications carrier with interconnection to the ILEC’s network for: ‘the transmission and routing of telephone exchange service and exchange access;’ at any technically feasible point; equal in quality to its own provision; on rates, terms, and conditions that are just, reasonable, and nondiscriminatory”) (citing 47 U.S.C. § 251(c)(2)).

On April 24, 2009, the NCUC issued its *RAO*, which required AT&T to offer interconnection to Intrado Comm pursuant to Section 251(c) of the Act. *See RAO* at 11-12. The NCUC determined in the *RAO*, after a careful analysis of the factual and legal record before it, that Intrado Comm’s 911 service satisfied the statutory definition of “telephone exchange service” and thus Intrado Comm was entitled to interconnect with AT&T pursuant to Section 251(c) of the Act. *See RAO* at 11-12. The NCUC then entertained additional comments and objections from the parties regarding the findings in the *RAO*.¹² After reviewing those comments on the *RAO*, the NCUC issued a final order on September 10, 2009 ruling on all remaining issues between the parties. *See generally Order on Objections*. On November 23, 2009, AT&T submitted an executed interconnection agreement on behalf of both of the parties consistent with the NCUC’s prior orders.¹³ AT&T now seeks review of the NCUC’s decision to grant Intrado

¹² Docket No. P-1187, Sub 2, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Order Requesting Comments on Objections and Suspending Filing Date for Composite Agreement (May 28, 2009) (Record Index No. 59).

¹³ Docket No. P-1187, Sub 2, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Letter from Edward L. Rankin, III, General Counsel, Legal Department, AT&T North Carolina, to Renné Vance, Chief Clerk, NCUC (filed Nov. 23, 2009), *attaching*

Comm interconnection based on AT&T's argument that Intrado Comm is not entitled to interconnection under Section 251(c) of the Act because Intrado Comm's 911 service does not qualify as "telephone exchange service."

As will be demonstrated in this Memorandum, the NCUC properly applied federal law in determining that Intrado Comm's 911 service meets the definition of telephone exchange service as set forth in 47 U.S.C. § 153(47) and the orders of the FCC interpreting that provision. Specifically, the NCUC correctly concluded that Intrado Comm's 911 service provides call origination, permits intercommunication, is offered in an exchange area for an exchange service charge, and is comparable to other telephone exchange services - the necessary components for a service to qualify as a telephone exchange service under the Act and applicable FCC interpretations. Consequently, AT&T's sole claim - and its sole excuse for refusing to undertake its Section 251(c) statutory interconnection duties in regard to Intrado Comm - fails as a matter of law. Summary judgment in favor of Intrado Comm, affirming the reasoning and conclusions of the NCUC, is thereby warranted. *See* FED. R. CIV. PROC. 56(c)(2); *see also, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

STANDARD OF REVIEW

Federal review of a state public utilities commission decision focuses on the body's understanding and construction of the Act, rather than on its factual findings. Courts in the Fourth Circuit conduct *de novo* review of a utility commission's interpretation of the Act, but apply a "substantial evidence" standard to the commission's factual findings. *See, e.g., GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 n.5 (4th Cir. 1999) (noting that "there is no

Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996; BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina and Intrado Communications Inc. (Record Index No. 74).

meaningful difference” between the substantial evidence standard and the arbitrary and capricious review of other federal courts) (citations omitted). Yet even with *de novo* review, the Fourth Circuit has recognized that “an order of a state commission may deserve a measure of respect in view of the commission's experience, expertise, and the role that Congress has given it in the Telecommunications Act.” *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d at 447.

ARGUMENT

I. THE NCUC CORRECTLY DETERMINED THAT INTRADO COMM’S 911 SERVICE CONSTITUTES “TELEPHONE EXCHANGE SERVICE” UNDER 47 U.S.C. § 153(47)

An analysis of the statutory definition of “telephone exchange service” depends on how a service is “implemented” and “the circumstances in which [it is] provided.” *DA Call Completion Order*¹⁴ ¶ 16; *Advanced Services Order*¹⁵ at n.36. AT&T’s action before this Court rests on a single, flawed proposition – Intrado Comm’s 911 service does not fulfill the Congressional definition of “telephone exchange service” under Section 153(47) of the Act. When analyzing how Intrado Comm’s 911 services are “implemented” and “provided,” as the NCUC did, it is clear that Intrado Comm’s 911 services permit call origination and intercommunication and are offered in an exchange area for an exchange service charge, and therefore meet the Act’s definition of “telephone exchange service.” 47 U.S.C. § 153(47).

The definition of “telephone exchange service,” as set forth in 47 U.S.C. § 153(47), contains two distinct parts, either of which may be met by a prospective carrier to warrant interconnection:

¹⁴ *Provision of Directory Listing Information under the Telecommunications Act of 1934, as Amended*, 16 FCC Rcd 2736 (2001) (“*DA Call Completion Order*”).

¹⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999) (“*Advanced Services Order*”).

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47). The statute is written in the disjunctive and satisfying only one prong of the definition (either Part (A) or Part (B)) will qualify a service as a telephone exchange service.

See Advanced Services Order ¶ 17; *see also RAO* at 13. Thus, a telephone exchange service under Part (A) of the definition must: (1) furnish subscribers intercommunicating service; (2) be within a telephone exchange or within a connected system of telephone exchanges within the same exchange area; and (3) be covered by an exchange service charge. 47 U.S.C. § 153(47)(A); *see also RAO* at 11. A telephone exchange service under Part (B) of the definition must: (1) be a comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof); (2) originate and terminate a telecommunications service; and (3) provide subscribers the ability to intercommunicate. 47 U.S.C. § 153(47)(B); *see also RAO* at 11; *Advanced Services Order* ¶ 30 (finding “intercommunication” is required under Part (B) even though the language of the Act does not state it).

As noted by the NCUC, the FCC has necessarily taken an “expansive” approach in applying this term, to ensure that non-traditional, technologically-advanced means of communication might obtain the market benefits of ILEC interconnection. *RAO* at 12; *Order on Objections* at 10; *see also Advanced Services Order* ¶ 21. The NCUC, therefore, correctly determined that the statutory language “should be given a liberal interpretation that furthers the purpose of telecommunications competition.” *RAO* at 12. An analysis of Intrado Comm’s 911 service pursuant to the framework established by the statute and the FCC’s rulings demonstrates

that Intrado Comm's 911 service fulfills *both* Parts A and B of the statute, despite only having to satisfy one. The NCUC's analysis of Intrado Comm's 911 service under federal law was based on a "preponderance of the evidence" and "closely conforms to the overall purpose of the Act - that is, one that allows for competition in telecommunications." *Order on Objections* at 10. The NCUC's decisions must therefore be upheld as a matter of law.

A. Intrado Comm's 911 Service Provides Call Origination

Consistent with the statutory language, the NCUC reviewed whether Intrado Comm's 911 service allows its customers to both originate and terminate calls. *RAO* at 13. In reviewing the available information, the NCUC noted with approval the findings of the Ohio commission in Intrado Comm's arbitration with AT&T there. *RAO* at 13; *see also generally AT&T Ohio Arbitration Award*.¹⁶ In the Ohio arbitration, the Ohio commission undertook a qualitative analysis and determined that Intrado Comm's 911 service allows for origination as contemplated by 47 U.S.C. § 153(47). *AT&T Ohio Arbitration Award* at 16. The NCUC concurred with the Ohio commission's conclusion "that the capability of a PSAP to call another PSAP and engage in two-way communications with 911 callers satisfies the call origination and termination requirement." *RAO* at 13; *AT&T Ohio Arbitration Award* at 16. The NCUC, like the Ohio commission, noted that the existence of any amount of origination satisfies the statute because the quantity of origination is irrelevant. *RAO* at 16; *see also AT&T Ohio Arbitration Award* at 16. Other state commissions have made similar findings with respect to whether competitive

¹⁶ Interestingly, both AT&T and Intrado Comm submitted authorities from other states in support of their arguments. AT&T, for example, submitted orders from the Florida Public Service Commission and Illinois Commerce Commission finding that Intrado Comm did not offer telephone exchange service. *See RAO* at n.2. The NCUC, however, found the "reasoning and analysis [of the Ohio commission] to be persuasive." *RAO* at 13; *see also BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d at 448 (noting that although review of a state commission's interpretation of 1996 Act is *de novo*, "respect is due the orders of the NC Commission. . . . demonstrat[ing] valid and thorough reasoning, including careful reading and harmonizing of relevant authorities and policies; and they align with the decisions of other state commissions") (emphasis added).

911 services meet the “origination” requirement in the statutory definition.¹⁷

In the arbitration, AT&T vigorously disputed the ability of Intrado Comm’s 911 service to allow for call origination by arguing that the “hook flash” capability available with Intrado Comm’s service does not constitute origination. *See, e.g.,* AT&T Objections to *RAO* at 10 (Record Index No. 58); AT&T Proposed Order at 9 (Record Index No. 48). Using the hook flash feature, an Intrado Comm PSAP customer may receive a 911 call and then hook flash to obtain a dial tone and originate a call to a third party to either transfer the originating 911 caller to the third party or create a three-way conference call. *See* Intrado Comm Post-Hearing Brief at 14 (Record Index No. 46).

Contrary to AT&T’s assertions, *see* AT&T Objections to *RAO* at 10 (Record Index No. 58), when a PSAP receives a 911 call, hook flashing is *the means by which it obtains a dial tone to place a call* to a third party via the central office serving as the 911 selective router. The third party is subsequently bridged to the original 911 caller, and the PSAP has the option of either disconnecting or remaining on the line to participate in the subsequent conversation. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, et al.*, 18 FCC Rcd 12379, ¶ 73 (2003) (“*TRS Order*”) (explaining the hook flash concept).¹⁸ The PSAP’s function in this regard is little different from call transfers in

¹⁷ *See, e.g.,* Kentucky Case No. 2009-00438, *Petition of Communications Venture Corporation d/b/a Indigital Telecom for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky Pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, Order, at 13 (Apr. 9, 2010) (“*Kentucky 911 Order*”) (“The Commission finds that this type of [interconnected] service [between 911 callers, PSAPs, and other emergency personnel in the relevant geographic area] satisfies the requirements of origination by enabling two-way communications between a PSAP and a 911 caller, or two-way communications between two PSAPs or other emergency service providers”) (Exhibit 12).

¹⁸ It is especially noteworthy that these statements regarding hook flash are made in the context of telecommunications relay service (“TRS”), which uses the abbreviated dialing code “711” to give users access to TRS, similar to the way in which the abbreviated dialing code “911” provides access to emergency services. *See Petition by the United States Department of Transportation for Assignment of*

a typical office environment (in which an individual transferring a call obtains a dial tone to initiate a call to another party) or three-way calling (in which the individual responsible for conferencing obtains a dial tone to connect a third party number). *See id.* (“After making or receiving the first connection, the TRS user presses the flash button to put the first person on hold and get a new dial signal. The TRS user then dials the third party’s number.”). Both the NCUC and Ohio commission recognized this point, concluding that “call transfers and conferencing involve call originating” via hook flash, enabling communication between a PSAP, a 911 caller, and a third party. *AT&T Ohio Arbitration Award* at 16; *see also RAO* at 13; *DA Call Completion Order* ¶ 36; *AT&T Ohio Entry on Rehearing* at 4 (rejecting AT&T Ohio’s request for reconsideration and reaffirming that hook flash capability permitted PSAPs “to receive dial tone to originate a call to an emergency service provider”). Simply put, Intrado Comm’s 911 service utilizes a dial tone to accomplish a transfer or conferencing task, and therefore satisfies the FCC’s understanding of call origination. *See TRS Order* ¶ 73.

The NCUC also correctly rejected AT&T’s attempt to rely on service descriptions set forth in Intrado Comm’s tariff.¹⁹ *AT&T Objections to RAO* at 11-12 (Record Index No. 58). First and foremost, AT&T’s reliance on the terms and conditions in Intrado Comm’s tariff as somehow representing the absolute boundaries of Intrado Comm’s service offerings is wrong.

an Abbreviated Dialing Code (N11) to Access Intelligent Transportation System (ITS) Services Nationwide, 15 FCC Rcd 16753, ¶ 1 (2000) (“N11 codes are abbreviated dialing arrangements that allow telephone users to connect with a particular node in the network by dialing only three digits.”).

¹⁹ Competitive carriers are not required to file tariffs in North Carolina. *See* N.C. GEN. STAT. § 62-134(h) (permitting the NCUC to establish practices and procedures to permit detariffing for competitive services offered by a public utility); N.C. GEN. STAT. § 62-133.5(d) (requiring local exchange companies subject to elective price regulation to file tariffs for basic local exchange service and toll switched access service); N.C. GEN. STAT. § 62-133.5(h), (i) (permitting local exchange company subject to competition or competing local provider to exempt the “terms, conditions, rates, or availability” of its retail service from NCUC regulation). Thus, AT&T relied on Intrado Comm’s Florida tariff providing the rates, terms, and conditions for its 911 services to Florida PSAPs as that tariff existed at the time. *AT&T Rebuttal Testimony* at PHP-1 (Record Index No. 23).

Tariffs are not finite - they can be revised, changed, and modified at any time, and do not necessarily reflect all of a company's services for all time. *See, e.g., Implementation of the Telecommunications Act of 1996, et al.*, 14 FCC Rcd 14409, ¶ 28 (1999) (recognizing that carriers will introduce new and improved services and products in a competitive market). This is the exact reason that the NCUC does not require competitive carriers to file with the NCUC tariffs containing their rates, terms, and conditions. *See, e.g., Docket No. P-100, Sub 133, Local Exchange and Local Exchange Access Telecommunications Competition, Order Concerning Motion for Reconsideration* (Nov. 29, 2000).

Further, AT&T's argument assumes that a PSAP's *reception* of a call originated by a 911 caller necessarily precludes *origination of a subsequent call* by that same PSAP. As just explained - by reference to the FCC's understanding of call origination in the TRS context - a PSAP transfers a received 911 call by making a *second* call to a third party, such as another PSAP or first responder, and then links all the parties together, pending its own disconnection or further participation. *See TRS Order* ¶ 73. Nor is AT&T's contention that "[i]t is not Intrado's intention to serve the end users who place the 911 calls" at all material to the question of whether Intrado Comm's 911 service provides origination. AT&T Proposed Order at 7 (Record Index No. 48). The test is whether *Intrado Comm's customer, i.e., the PSAP*, can originate a call. The NCUC correctly focused its analysis on the functionality available to Intrado Comm's PSAP customers, and the NCUC's rejection of AT&T's arguments to the contrary should be upheld.

B. Intrado Comm's 911 Service Provides Intercommunication

The NCUC's decisions reflect the appropriate reading of federal law on the issue of whether Intrado Comm's 911 service provides intercommunication. *RAO* at 12. Intercommunication, in the FCC's view, is the "key component" of the telephone exchange

service definition. *See Advanced Services Order* ¶ 30. A service satisfies the requirement to provide intercommunication when a service “permits a community of interconnected customers to make calls to one another over a switched network.” *Id.* ¶ 23.

AT&T’s claims that the NCUC ignored the FCC’s definition of the term are baseless. *See, e.g.,* AT&T Objections to *RAO* at 6 (Record Index No. 58). The NCUC first noted that the term, while central to both parts of 47 U.S.C. § 153(47), “is not separately defined in the Act, nor is it exactly a term of art.” *RAO* at 11. The NCUC then undertook a thoughtful examination of FCC precedent and plain-language definitions of intercommunication. While AT&T may criticize this approach, it is well-established that, absent “an indication to the contrary,” words within a statute not accorded specific definitions “are assumed to bear their ordinary, contemporary, common meaning.” *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997) (international quotation marks and citation omitted); *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994) (“Generally, in examining statutory language, words are given their common usage. Courts are not free to read into the language what is not there, but rather should apply the statute as written”) (internal citations omitted); *United States v. Snider*, 502 F.2d 645, 651 (4th Cir. 1974) (“It is a familiar rule of statutory construction that Congress is presumed to have used words according to their ordinary meaning, unless a different signification is clearly indicated”) (citation omitted).

With that foundation, the NCUC accordingly determined that “intercommunication can include a situation in which one person delivers a message to another even if the other person does not or cannot reply.” *RAO* at 12. Like the Ohio commission, the NCUC concluded that the statute does not require a certain amount of intercommunication - it only requires “the existence of intercommunication.” *RAO* at 13; *see also AT&T Ohio Arbitration Order* at 15.

Thus, the NCUC correctly found that Intrado Comm's 911 service permits intercommunication by virtue of its being capable of two-way *communication*, even if it does not always carry two-way *traffic*. *RAO* at 13. This conclusion is well-supported by federal precedent, which holds the existence of two-way communications - *not* two-way traffic - paramount in establishing intercommunication. *Advanced Service Order* ¶ 20. Indeed, the FCC has "nowhere suggested that two-way voice service is a necessary component of telephone exchange service." *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, 13 FCC Rcd 24011, ¶ 43 (1998) (citing *Local Competition Order* ¶ 1013) (subsequent history omitted). As the NCUC observed, AT&T's *own designation* of one-way paging services as a service capable of intercommunication demonstrates its recognition of this fact. *See RAO* at 13; *see also* Public Staff Objection Comments at 1 (finding it "reasonable to contend that AT&T is estopped from disputing that the service Intrado proposes to provide, a one-way service, is not 'telephone exchange service' when it has entered into interconnection agreements with one-way paging companies where one-way paging is treated as local traffic") (Record Index No. 62).

AT&T's criticism of 911 callers' inability to make calls using the 911 service is therefore unavailing. AT&T Proposed Order at 7 (Record Index No. 48). The NCUC's analysis parallels the FCC's own understanding of how services satisfy the intercommunication requirement as explained in its analysis of xDSL-based advanced service – "although a customer must designate the [internet service provider] ISP or third party to whom his or her high-speed data transmissions are directed" (in the same way that a PSAP waits for a 911 call before originating a subsequent call to a first responder or other PSAP), "once on the packet-switched network, a customer may rearrange the service to communicate with any other subscriber located on that

network through the use of packet-switching technology.” *DA Call Completion Order* ¶ 24 (emphasis added). There is consequently no significance to AT&T’s claims.²⁰

In addition, AT&T unduly simplifies the abilities of Intrado Comm’s 911 services, incorrectly depicting them as little more than serial links in a chain between particular designated points. AT&T Objections to *RAO* at 7 (Record Index No. 58). As the NCUC rightly observed, Intrado Comm’s 911 services facilitate PSAP-to-PSAP communications. *RAO* at 13. This feature clearly satisfies the FCC’s *and* AT&T’s understanding of an intercommunicating service as one that “must enable the subscriber to make calls to ‘all subscribers.’” AT&T Objections to *RAO* at 7 (citing *Advanced Services Order* ¶¶ 20, 23-24, n.61; *DA Call Completion Order* ¶¶ 17, 21) (Record Index No. 58). The FCC’s decisions make this point plain - a “non-traditional” communications system provides intercommunication so long as it “permits a community of interconnected customers to make calls to one another in the manner prescribed by the statute.” *RAO* at 12; *see also DA Call Completion Order* ¶¶ 17-18.

Nor is Intrado Comm’s 911 service “limited to aggregating 911 calls at Intrado’s selective router and then routing those calls to Public Safety Answering Points” as a “private line service” operating across “specific, predetermined points” as AT&T argues. *See* AT&T Proposed Order at 7 (Record Index No. 48); AT&T Objections to *RAO* at 8 (Record Index No. 58). The NCUC correctly rejected these arguments because there exists no “predesignated transmission path” or facility “set aside for the exclusive use or availability” of the 911 customer to reach the PSAP. *Advanced Services Order* ¶ 25. Intrado Comm’s 911 service also cannot be viewed as a mere “hub-and-spoke arrangement,” AT&T Objections to *RAO* at 9 (Record Index

²⁰ Such a criticism bespeaks a fundamental misunderstanding of the purpose of a dedicated emergency communications system. *See* N.C. GEN. STAT. § 62A-40(4) (“911 system” is defined as “[a]n emergency telephone system” that “[p]rovides enhanced 911 service” and “[e]nables the *user of a voice communications service connection to reach a PSAP* by dialing the digits 911”) (emphasis added).

No. 58), given PSAPs purposeful use of call origination in amongst a community of PSAPs, first responders, and emergency service agencies, per the 911 caller's unique needs. *RAO* at 13.

Accordingly, the NCUC properly concluded based on its interpretation of federal law and the record evidence that Intrado Comm's 911 services fulfill the FCC's "expansive . . . definition of telephone exchange services" by providing intercommunication amongst an interconnected community in a flexible, progressive manner. *RAO* at 12. AT&T's challenges to the NCUC's decisions should therefore be denied as a matter of law.

C. Intrado Comm's 911 Service Fulfills the Requirements that the Service be "Within a Telephone Exchange, or Within a Connected System of Telephone Exchanges Within the Same Exchange Area" and Covered by the Exchange Service Charge

The NCUC properly determined that Intrado Comm's 911 services are provided within "geographical boundaries" consistent with an exchange area. *RAO* at 13 (citing *AT&T Ohio Arbitration Award* at 16). A 911 service's geographical area is tailored to fulfill the basic purpose of 911 calling - to link an individual in distress with the closest appropriate emergency assistance authorities. *See Wireless E911 Location Accuracy Requirements*, 22 FCC Rcd 20105, ¶¶ 2-3 (2007). The NCUC therefore correctly rejected AT&T's arguments that Intrado Comm's service territory was required to match ILEC exchange boundaries. *See, e.g., AT&T Objections to RAO* at 14 (Record Index No. 58); *see also AT&T Proposed Order* at 7-8 (Record Index No. 48).

The NCUC dismissed these arguments, seconding the Ohio commission's "reject[ion] [of] AT&T's argument that exchange boundaries must be coterminous with ILEC exchange boundaries." *RAO* at 13; *see also AT&T Ohio Arbitration Award* at 15-16. Geographic or "local areas" are not necessarily based on ILEC exchange boundaries. It is for this reason that expanded area service ("EAS") and expanded local calling service ("ELCS") have developed to

ensure all members of a “community of interest” can reach other subscribers without incurring a toll charge. *See generally Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, 12 FCC Rcd 10646 (1997). 911 service works in the same way – 911 callers and PSAPs in a community of interest can reach each other regardless of the existing designated ILEC exchange areas.

Thus, the NCUC appropriately termed AT&T’s “split wire” objection “not particularly persuasive,” noting that “[i]t fails to take into account the existence of extended area service (EAS), not to mention extended local calling areas (ELCA) or the fact that competing local providers are not formally bound to adopt the ILEC’ local exchange boundaries for themselves.” *RAO* at 13 n.8. These determinations were wholly correct based on federal law as well as record evidence before the NCUC. Local calling areas, drawn from the vagaries of ILEC monopoly infrastructure development, frequently fail to fulfill the purpose of 911 calling. A fire engine from two towns over, for example, may be a local call according to a customer’s basic telephone service, but would arrive too late to extinguish a spreading blaze.²¹

²¹ *Kentucky 911 Order* at 13-14 (“However, part (A) [of 47 U.S.C. § 153(47)] does not have a specific boundary requirement and, more importantly, the parties are well aware that wireless service and incumbent-to-incumbent extended areas of service arrangements are designed to facilitate local calls across the boundaries of neighboring exchanges and have already been found to satisfy the definition requirements of within ‘a telephone exchange.’ PSAPs must have a service that takes into account the location of fire, police, and other emergency personnel within the geographic area for that PSAP or local government jurisdiction. The reach of a particular local 911 service may not always coincide with the boundaries of the incumbent’s exchanges; however, the service would generally have geographic limits that are consistent with a community of interest relative to that PSAP. The 911/E911 service would take into account wireless calls and, potentially, emergency service providers who may be located just beyond the boundary of certain exchanges but who are obligated to provide emergency assistance to a caller physically located within an exchange. INdigital’s 911/E911 service will account for geographic location in the dispatch of emergency assistance generally consistent with the community of interest in relation to the PSAP, the caller-in-need, and the location of the closest emergency personnel—all of which may or may not exactly coincide with specific exchange boundaries”) (Exhibit 12); *Indiana Cause No. 43499, Joint Complaint of Communications Venture Corporation d/b/a INdigital Telecom, et al*, Final Order, at 15 (Feb. 10, 2010) (“*Indiana 9-1-1 Order*”) (explaining potential interconnection between Intrado Comm in Ohio and INdigital Telecom in Indiana, per parties’ recognition “that as wireless sites or sectors commonly overlap state boundaries . . . there will be a need for Intrado-served PSAPs and INdigital-

Indeed, ILEC exchange boundaries have no bearing on the provision of 911 services. The FCC and the federal district court overseeing the Modified Final Judgment recognized that many 911 “transmissions cross LATA boundaries.” *Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, as amended, to Certain Activities*, 13 FCC Rcd 2627, ¶ 20 (1998) (“*Forbearance Order*”). The district court specifically waived the LATA restrictions to ensure the Bell Operating Companies (“BOCs”), like AT&T, could “provide, using their own facilities, 911 emergency service across LATA boundaries to any 911 customer whose jurisdiction crosses a LATA boundary,” thus allowing “the BOCs to provide multiLATA 911 services, including E911 services.” *United States v. Western Electric Company*, Civil Action No. 82-0192, Misc. No. 82-0025 (PI), slip op. at 5 n.8 (D.D.C. Feb. 6, 1984); *see also Forbearance Order* ¶ 9; Letter from Constance E. Robinson, Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, to Alan F. Ciamporzero, Pacific Telesis Group, I (Mar. 27, 1991). The FCC also recognized that selective routers often serve 911 callers and PSAPs in more than one LATA. *See Forbearance Order* ¶ 9. Thus, there is no requirement that Intrado Comm’s service offering be based on AT&T’s exchange boundaries to qualify as a telephone exchange service under the Act.

FCC precedent manifestly supports the fact that Intrado Comm’s 911 services fulfill the exchange area requirement. A local telephone exchange “is based on geography and regulation,” not exchange boundaries drawn to define telephone company service areas. *Advanced Services Order* ¶ 22. The FCC has conclusively determined that the telephone exchange service definition “does not require a specific geographic boundary.” *Application of BellSouth Corp.*,

served PSAPs to transfer 911 calls in both directions between their respective PSAPs”) (Exhibit 13), *notice of appeal filed* Case No. 93A02-1003-EX-284, *Indiana Bell Telephone Company v. Indiana Regulatory Commission* (Ind. Ct. App. filed Mar. 12, 2010).

BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599, ¶ 30 (1998) (“*BellSouth Louisiana II Order*”). Moreover, the statutory definition “demonstrates that the Congress has authorized the [FCC] to characterize as ‘exchange service’ even services that do not use exchanges.” *GTE Service Corp. v. FCC*, 224 F.3d 768, 774-75 (D.C. Cir. 2000). This can be witnessed, for example, in wireless providers’ geographic service areas, which differ from conventional wireline exchange area boundaries but are nonetheless considered to be “within a telephone exchange” or “a connected system of telephone exchanges within the same exchange area” for purposes of the Act’s definition of “telephone exchange service.” *BellSouth Louisiana II Order* ¶ 30; *see also RAO* at n.7.

The NCUC therefore correctly determined based on these concepts that Intrado Comm’s service, which interconnects 911 callers, PSAPs, and first responders in the same geographic area, fulfills the FCC’s criteria as well. *RAO* at 13. Telephone exchange service includes any “means of communicating information within a local area” and involves “a central switching complex which interconnects all subscribers within a geographic area.” *Advanced Services Order* ¶ 17; *BellSouth Louisiana II Order* ¶ 28. Intrado Comm’s 911 services use selective routers (*i.e.*, switches) to interconnect PSAPs and 911 callers located in the same geographic area.

In addition, Intrado Comm’s services are “covered by the exchange service charge” as required under 47 U.S.C. § 153(47). The FCC has specifically found that, “in a competitive environment, where there are multiple local service providers and multiple services, there will be no single ‘exchange service charge.’” *Advanced Services Order* ¶ 28. The *only* requirement is that Intrado Comm’s customers obtain “the ability to communicate within the equivalent of an

exchange area as a result of entering into a service and payment agreement with” Intrado Comm. *Advanced Services Order* ¶ 27. As the NCUC recognized, by way of reference to the *AT&T Ohio Arbitration Award*, evidence of an exchange service charge is found in the fees paid to Intrado Comm by its customers, (*i.e.*, PSAP customers, enterprise, and telematics customers, and, if a 911 access service tariff is filed, for service providers).²² *See RAO* at 13; *AT&T Ohio Arbitration Award* at 16.

D. Intrado Comm’s 911 Service is Comparable to Other Non-Traditional Communications Services that Meet the Definition of Telephone Exchange Service

AT&T criticized the *RAO* for noting that AT&T’s “own E911 tariff described its offering as a ‘telephone communications service,’ a classification that Intrado argued is comparable if not identical to telephone exchange service.” AT&T Objections to *RAO* at 17 (citing *RAO* at 13) (Record Index No. 58). While AT&T rightly observed that the term “telephone exchange service” was never employed in its 911 tariff - *see* AT&T Objections to *RAO* at 13 (Record Index No. 58) - it unduly simplified the NCUC’s argument. The *RAO* characterized as “highly relevant and instructive” not just AT&T’s treatment of its own 911 service as amenable to interconnection, but also that of a “one-way paging company that regarded one-way paging as local traffic.”²³ *RAO* at 13 (emphasis in original); *see also* Public Staff Proposed Order at 9 (“AT&T witness Pellerin admitted that AT&T has entered into an interconnection agreement

²² *See also Kentucky 911 Order* at 15 (“The Commission findings that this [exchange service charge] definition is satisfied, as INdigital, in the same manner as AT&T Kentucky, will have its PSAP customers render payment to INdigital if selected by that PSAP’s local government or agency to route local emergency calls and information to the service center”) (Exhibit 12).

²³ While AT&T’s witness attempted to distinguish its supposed “lower case communications service” from Intrado Comm’s 911 service, for purposes of telephone exchange service similarity, based on the latter’s apparent reliance on “municipal boundaries” and the former’s use of a “Telephone Exchange Service” in call completion - *see* Tr. Vol. 2, 142-43 (Record Index No. 40); Pellerin Public Staff Cross Examination Exhibits 1, 2, and 3 (Record Index No. 38) - this distinction is untenable in light of FCC precedent as explained above. *See BellSouth Louisiana II Order* ¶ 30.

with a one-way paging company that regarded one-way paging as local traffic. Thus, it appears that AT&T itself has treated 911/E911 service or other services with similar characteristics as telephone exchange services.”) (internal citations omitted) (Record Index No. 47).

Similarity and comparability between *existing* and *putative* telephone exchange services are material in the application of 47 U.S.C. § 153(47). The characteristics of non-traditional communications services classified as “telephone exchange services” do not themselves define the term, but merely provide useable examples of the application of the statutory criteria to a particular service. *See Advanced Services Order* ¶ 29 (while the term “comparable” is not defined in the Act, it is generally understood to mean “having enough like characteristics and qualities to make comparison appropriate”). Were this not the case, a litmus test would result, screening out all but the most traditional forms of communication and defeating the FCC’s interest in fostering interconnection amongst non-traditional forms of communication. *See id.* ¶¶ 17, 21 (noting that “telephone exchange service” must be construed broadly in light of evolving voice and data technologies if the pro-competitive purpose of the Act is to be achieved); *see also Kentucky 911 Order* at 13 (noting that “provision of telephone exchange service is not limited only to traditional local exchange service through resale and facilities ownership, but may include the provision of alternate loops for telecommunications service, separate from the public switched telephone network, in a manner that is comparable to the provision of local loops by a traditional local exchange carrier”) (citing *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 54 (1998)) (Exhibit 12).

Consequently, the NCUC correctly applied FCC precedent by undertaking an independent analysis based on the elements in the statutory definition as implemented by the FCC - with due consideration of AT&T’s own treatment of similar services in the past - and

applying those elements to the specific facts of Intrado Comm's 911 service offering. *See BellSouth Louisiana II Order* ¶ 29 (adopting "a practical approach to applying [the "telephone exchange service"] definition" given "the evolving nature of the provision of services in the telecommunications market"). The similarities between Intrado Comm's 911 services and existing "non-traditional" communication services classified as offering telephone exchange service further buttress Intrado Comm's entitlement to Section 251(c) interconnection with AT&T.

II. IN THE ALTERNATIVE, THIS COURT MAY DEFER REVIEW OF THESE ISSUES PENDING RESOLUTION BY THE FCC

Issues similar to those raised by AT&T here are currently pending in arbitration proceedings before the FCC. In those proceedings, the FCC has stepped in the shoes of the Virginia State Corporation Commission, which refused to act on Intrado Comm's arbitration proceedings with Embarq and Verizon in that state.²⁴ While the instant Memorandum demonstrates that the NCUC decisions at issue are consistent with federal law, based on substantial evidence, and not arbitrary and capricious, the Court may defer consideration of this case pending the outcome of the FCC proceedings or otherwise refer these issues to the FCC for resolution under the doctrine of primary jurisdiction given that the FCC proceeding will address many of the same questions currently before this Court. *See Global NAPS North Carolina, Inc. v. BellSouth Telecommunications, Inc.*, 455 F. Supp. 447, 448 (E.D.N.C. 2006). In any event, the Court should not disturb the NCUC's findings while these issues are squarely before the FCC, the entity charged with interpreting provisions of the Act, including the import and

²⁴ *Petition of Intrado Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Arbitration of an Interconnection Agreement with Central Telephone Company of Virginia and United Telephone – Southeast, Inc. (collectively, Embarq), et al.*, 23 FCC Rcd 17867 (2008) (consolidating the Embarq and Verizon arbitrations).

meaning of 47 U.S.C. § 153(47). *See, e.g., BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d at 447 (“Actions of state commissions taken under 47 U.S.C. §§ 251 and 252 are reviewed in federal court *de novo* to determine whether they conform with the requirements of those sections. . . . To be sure, state commissions’ orders construing the Telecommunications Act fall outside *Chevron*’s domain and its mandate of deference to reasonable interpretations of ambiguous statutes, because the Telecommunications Act, 47 U.S.C. § 251(d)(1), delegated interpretive authority to the FCC, not to the state commissions”) (internal citations omitted).

CONCLUSION

For the foregoing reasons, AT&T's claims should be denied and summary judgment should be entered in favor of Intrado Comm.

Respectfully submitted this 26th day of April 2010.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

Case No. 5:09-CV-00517-BR

BellSouth Telecommunications, Inc.)
d/b/a AT&T North Carolina,)
)
Plaintiff,)
)
v.)
)
Edward S. Finley, Jr., Chairman,)
Lorinzo L. Joyner, Commissioner, and)
William T. Culpepper, III, Commissioner,)
in their official capacities and not as individuals)
)
and)
)
Intrado Communications Inc.,)
)
Defendants.)

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record: Eric H. Cottrell, attorney for Plaintiff, and Margaret A. Force, Attorney for Defendant North Carolina Utilities Commission Commissioners.

Respectfully submitted,

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